**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 0 1 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth M'Cormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (the director), denied the employment-based immigrant visa petition on February 21, 2013. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a human services agency. It seeks to employ the beneficiary permanently in the United States as a Senior Behavior Consultant, Level II, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum 60 months of experience in the job offered as required by the labor certification and denied the petition accordingly.

The record shows that the appeal is properly filed and timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[2]

At issue in this case is whether the beneficiary possesses an advanced degree as required by the terms of the labor certification and the requested preference classification.

On appeal, the petitioner's counsel asserts that the director's decision was arbitrary and capricious and an abuse of his discretion. Counsel further asserts that the Senior Behavior Consultant title falls under the occupational code 21-1012.00, "Child, Family, and School Social Worker" and that "[h]er former job duties are the same/similar than what the proffered position is, and all her former positions falls [*sic*] under the same [code]." Counsel asserts that the director erred in requiring 60 months of experience as a Senior Behavior Consultant, rather than looking at the 60 months of experience requirement for the proffered job that is categorized by the DOL as "Child, Family, and School Social Worker" regardless of what the various employers title the position.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

[2] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

Before discussing whether the beneficiary possesses an advanced degree, the AAO will discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[3] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

[3] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* revisited this issue in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984), stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). (*See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

**Eligibility for the Classification Sought**

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, the petitioner claims that the beneficiary may be classified as an advanced degree professional based on a U.S. bachelor's degree followed by at least five years of progressive experience in the specialty.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

On the ETA Form 9089, signed by the beneficiary on June 8, 2012, she indicated that the highest level of achieved education related to the requested occupation was a Bachelor's degree in psychology and communications. She listed the institution of study where that education was obtained as " in Kalamazoo, Michigan, and the year completed as 2004. In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's certificate for Bachelor of Science degree and college transcripts indicating her majors as psychology and broadcast/cable production.

The beneficiary listed the following employment on the ETA Form 9089:

| Employer | Dates of employment | Position Title |
|---|---|---|
| | December 18, 2006 to present | Senior Behavior Consultant |
| | September 1, 2004 to December 10, 2006 | Clinical Assistant |
| | September 1, 2003 to May 30, 2004 | Behavior Technician |
| | June 7, 1999 to March 22, 2002 | Associate Behavior Counsel |

The beneficiary's bachelor's degree was awarded in April 2004. The language of the Act is unambiguous and states that a minimum five-year progressive experience gained after obtaining the bachelor's degree is considered to be the equivalent of a master's degree. Therefore, the beneficiary's experience prior to April 2004 cannot be considered post-baccalaureate "progressive experience" pursuant to the Act.

Regarding the beneficiary's experience as a Senior Behavior Consultant with the petitioner, representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.[4] Specifically, the petitioner indicates that questions J.19 and J.20, which ask about

[4] 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

. . . . .

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

> (i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.
>
> (ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer cannot require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

> (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
> (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 60 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable[5] and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.a.5 that her position with the petitioner is Senior Behavior Consultant, and the description of the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as she was performing the same job duties more than 50 percent of the time. According to DOL regulations, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.

The record does not contain an experience letter from the petitioner in compliance with 8 C.F.R. § 204.5(g)(1) explaining the beneficiary's dates of employment and her duties. However, the petitioner indicated on the ETA Form 9089 that the beneficiary has been employed since December 18, 2006 as a Senior Behavior Consultant. According to the beneficiary's resume, her employment with the petitioner includes a position as a Behavior Consultant from December

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> (i) The term ''employer'' means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
> (ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

[5] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> 5) For purposes of this paragraph (i):
> . . .
> (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

2006 to March 2009 and another position as a Senior Behavior Consultant from March 2009 to present. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has failed to resolve this inconsistency and has failed to submit an experience letter describing the beneficiary's duties and responsibilities, as well as her employement dates for each position the beneficiary held with the petitioner.[6] Nevertheless, the terms of the labor certification require experience in the job offered, and both the Behavior Consultant and the Senior Behavior Consultant positions with the petitioner were in the job offered. Therefore, the beneficiary's experience with the petitioner cannot be considered in determining whether the beneficiary gained "progressive experience" during her employment with the petitioner.

Thus, the beneficiary's 27 months of experience with and one month of experience with are the only experiences that can be considered towards the 60 months of post-bachelor's degree experience. As such experience is not 60 months of experience, the beneficiary does not qualify for the position.

The record contains a letter dated June 25, 2012 from of stating that the beneficiary was employed from September 9, 2004 to December 8, 2006.[7] states that the beneficiary's duties included helping support Early Intervention Behavioral Treatments for children ages three to seven diagnosed with Autism Spectrum Disorder, writing and modifying instructional materials, and providing hands-on discrete trial therapy.

The record also contains an unsigned letter from of regarding the beneficiary's experience at the from September 2003 until May 2004. Several branches of the agency are listed in the left margin, which indicates that the West Campus is located " " Although, the address for the West Campus is the same as the there is no evidence in the record that took over the operations of the and that was the employer, supervisor, or the trainer of the beneficiary at the time the beneficiary was employed by the Therefore, the experience letter does not comply with the regulatory requirements set forth in 8 C.F.R. § 204.5(g)(1).

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[6] The record contains an offer of employment letter from the petitioner in which the petitioner indicates that the beneficiary is a current employee, however, the letter does not describe the beneficiary's duties and responsibilities in the positions that she held during her employment with the petitioner.

[7] The AAO considers the inconsistency in the beneficiary's employment dates at insignificant.

Therefore, the submitted experience letters do not establish that the beneficiary possessed five years of post-baccalaureate experience in the specialty.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary possessed at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. Therefore, the beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

**The Minimum Requirements of the Offered Position**

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on March 16, 2012.[8] The Immigrant Petition for Alien Worker (Form I-140) was filed on June 22, 2012.

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

On the ETA Form 9089, the "job duties" description for Senior Behavior Consultant states in summary:

> Assess individual clients initially in order to develop program plans; monitor ongoing behavior intervention plans for effectiveness and their relation to lesson plans; develop and write intervention plans; advice [*sic*] and train (hands-on) tutors, staff and families in the implementation of all programs, and basic principles; troubleshoot special problems in program implementation and expand programs for classrooms, care homes and private homes as assigned; organize, coordinate and direct the staff involved in a client's program including regular

[8] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

team meetings; complete all necessary paperwork including reports to describe the program plans and established deadlines; participate in monthly Community Services department meetings; conduct performance reviews on ABC Tutors and Lead Tutors; and communicate with Funding Source Personnel as needed.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: "Bachelor's"

H.4-B. Major Field Study: "Psychology"

H.6. Is experience in the job offered required for the job?

The petitioner checked "yes" to this question.

H.6.A If yes, number of months experience required:

The petitioner indicated "60"

H.7. Is there an alternate field of study that is acceptable?

The petitioner checked "no" to this question.

H.8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

H.9. Is a foreign educational equivalent acceptable?

The petitioner checked "yes" that a foreign educational equivalent would be accepted.

H.10. Is experience in an alternative occupation acceptable?

The petitioner checked "no" to this question.

H.14. Specific skills or other requirement.

The petitioner stated "none."

Furthermore, the petitioner indicated on the labor certification that the offered position is a "Level II" skill level.

According to GAL 2-98 (DOL), a Level II position includes the following:

> Level II employees are fully competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. They may **supervise or provide direction** to staff performing tasks requiring skills equivalent to a Level I. These employees receive only technical guidance and their work is reviewed for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. (Emphasis added).

The petitioner indicated on the labor certification that the duties of the proffered position as a Senior Behavior Consultant include directing staff and conducting performance reviews of the tutors and lead tutors, which are supervisory functions. Therefore, the petitioner must demonstrate that the beneficiary possessed 60 months of experience in the job offered, as required by the terms of the labor certification to include supervisory experience.

Other than her current position with the petitioner, none of the beneficiary's previous experience includes supervisory duties. In her June 25, 2012 letter, does not state that the beneficiary performed supervisory functions during her employment with . Similarly, the letters from of , dated March 14, 2012 and from of , dated December 13, 2012, do not state that the beneficiary performed any supervisory duties. Therefore, the beneficiary's experiences at and are not in the job offered and do not satisfy the labor certification requirements.[9]

The petitioner failed to establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date.

In summary, the petitioner failed to establish that the beneficiary possessed an advanced degree as required by the terms of the labor certification and the requested preference classification. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed.

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[9] As noted earlier, the experience pre-dating the award of the beneficiary's bachelor's degree in April 2004 may not be considered to establish that the beneficiary is qualified as an advance degree professional. This includes all of the employment with and all but one month of employment with Further, the experience letter from is unsigned. Moreover, the beneficiary did not list her employment with on her Form G-325A, signed on June 21, 2012.

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER**: The appeal is dismissed.